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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	MM Docket No. <u>97-234</u>
of the Communications Act	)	
--Competitive Bidding for Commercial	)	
Broadcast and Instructional Television Fixed	)	
Service Licenses	)	
	)	
Reexamination of the Policy	)	GC Docket No. 92-52
Statement on Comparative	)	
Broadcast Hearings	)	
	)	
Proposals to Reform the Commission's	)	GEN Docket No. 90-264
Comparative Hearing Process to	)	
Expedite the Resolution of Cases	)	

JOINT COMMENTS OF  
CERTAIN BROADCAST APPLICANTS

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**JOINT COMMENTS OF  
CERTAIN BROADCAST APPLICANTS**

Andrew and Julia Bernhard and Anthony Gazzana and Gregory Marcus (collectively "Joint Commenters"), applicants for certain broadcast licenses, by their undersigned counsel and pursuant to Section 1.415 of the Commission's Rules and Regulations, hereby file their joint comments in the above-captioned proceeding in response to the Commission's Notice of Proposed Rulemaking, FCC 97-397, (released November 26, 1997) (Notice). In the Notice, the Commission sought comment on whether it should conduct a closed auction that would be limited only to those pending mutually-exclusive applications filed after June 30, 1997, or whether those applications should be included within the Commission's first general broadcast auction for which the filing of additional competing applications would be permitted.<sup>1/</sup>

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<sup>1/</sup> Notice, at ¶42.

For the reasons set forth below, the Joint Commenters urge the Commission to resolve pending applications filed after June 30, 1997, by means of a closed auction.

## **I. STATEMENT OF INTEREST AND INTRODUCTION**

Andrew and Julia Bernhard (hereinafter "Bernhard") and Andrew Gazzana and Gregory Marcus (hereinafter "Gazzana/Marcus") currently have pending before the Mass Media Bureau applications for construction permits for new FM stations. Bernhard's application seeks authority to construct a new FM station that would operate at 101.5 MHz in Oakley, Utah.<sup>2/</sup> Gazzana/Marcus' application seeks authority to construct a new FM station that would operate at 105.3 MHz Mukwonago, Wisconsin.<sup>3/</sup> Both applications were filed in response to filing windows established by the Commission and, in both cases, competing applications were also filed for the same frequencies requested by Joint Commenters.

As both Bernhard and Gazzana/Marcus filed their applications after June 30, 1997, they would be particularly affected by the auction rules adopted in this proceeding. Of greatest concern to these parties is the issue of whether the Commission should award the licenses at issue in these applications in a closed auction whereby participation would be limited only to those who have already filed pending applications or whether the licenses at issue in these applications should be

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<sup>2/</sup> File Number BPH-971120ML. See Public Notice, "Broadcast Applications," Report No. 24132 (released December 5, 1997).

<sup>3/</sup> File Number BPH-970821MJ. See Public Notice, "Broadcast Applications," Report No. 24069 (released September 4, 1997).

subjected to a second filing window whereby additional competing applications would be permitted. As discussed below, these parties urge the Commission to award licenses for these broadcast frequencies through a closed auction. Such action would be consistent with Congressional intent and the public interest objectives set forth in the Communications Act. Moreover, a closed auction would be appropriate in this case as the Commission has not proposed to change the nature of the broadcast FM service.

## **II. A CLOSED AUCTION IN THIS CASE WOULD SATISFY CONGRESSIONAL INTENT.**

As the Commission noted, Section 309(j)(1), as amended by the Balanced Budget Act of 1997,<sup>4/</sup> is silent on the issue of whether the Commission may conduct a closed auction for those broadcast applications filed after June 30, 1997.<sup>5/</sup> Thus, the Commission is not required by Congress to subject these pending applications to the filing of additional competing applications. Moreover, while Congress expressed concern that the Commission establish a filing window for all applications regardless of when such applications were filed, a reading of the legislative history clearly demonstrates that Congress' concern in this area existed with respect to those instances where the Commission had not yet established a filing window.<sup>6/</sup> Thus, in the case of pending applications that previously had been subject to a filing window,

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<sup>4/</sup> Pub. L. No. 105-33, 111 Stat. 251 (1997).

<sup>5/</sup> Notice, at ¶ 42.

<sup>6/</sup> See H. Rep. No. 105-217., 105th Cong., 1st Sess. (1997).

nothing in the statute or legislative history requires the opening of a second filing window.

As noted above, Joint Commenters' applications for new FM stations were filed during a filing window opened by the Commission. In addition to their applications, other parties have filed competing applications for the same markets and frequencies as Joint Commenters. Thus, as the Commission has already provided opportunities for the filing of competing applications with respect to Joint Commenters' applications, it is clear that legislative intent has been satisfied in this case.

**III. AN OPEN AUCTION IS UNNECESSARY WHERE, AS HERE, THE COMMISSION DOES NOT PROPOSE SUBSTANTIAL CHANGE TO THE NATURE OF THE BROADCAST FM SERVICE.**

In adopting service and auction rules for the 220 MHz service, the Commission declined to hold an auction limited only to those applicants with pending applications, preferring instead to permit the filing of applications by additional applicants.<sup>7/</sup> The Commission reasoned that the public interest would be served by this approach since the rules adopted for the 220 MHz service significantly altered the technical and operational rules for 220 MHz.<sup>8/</sup> This, in turn, resulted in a substantial change in the nature of the 220 MHz service as compared to what the service was in 1991, when

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<sup>7/</sup> Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, GN Docket No. 93-252, and PR Docket No. 93-253, Third Report and Order, Fifth Notice of Proposed Rulemaking, FCC 97-52 (1997) (hereinafter "Third Report and Order"). In this case, the Commission decided to dismiss the pending applications without prejudice and allow them, as well as additional interested parties, to file applications in the 220 MHz auction.

<sup>8/</sup> Third Report and Order, at ¶ 197.

the pending applications had been filed.<sup>9/</sup> The Commission stated in light of this change that, "it would be unfair to preclude new applicants from having the opportunity to apply for these 220 MHz licenses."<sup>10/</sup>

Such a policy concern is not present here. Unlike the 220 MHz proceeding, the rules proposed in the Notice merely address the procedure by which applications are to be auctioned. There is nothing in the Notice which would result in a substantial change in the nature of the broadcast FM service. Moreover, there has been no substantial change in the broadcast FM service since the opening of the filing windows during which Joint Commenters and other parties filed their applications. As such, there is no basis for re-opening the filing windows to allow additional competing applications against Joint Commenters' pending applications. The mere fact that these broadcast applications are now subject to auction, in and of itself, should not be viewed as a substantial change to the nature of the broadcast FM service such that those who were not interested in competing for these licenses previously, would suddenly become interested in these licenses now that they appear to require purchase at auction.

#### **IV. RE-OPENING FILING WINDOWS TO PERMIT ADDITIONAL COMPETING APPLICATIONS WOULD NOT SERVE THE PUBLIC INTEREST**

Permitting additional applicants to compete for licenses for which applications have already been filed will not serve the public interest. First, such action would only

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<sup>9/</sup> Id., at ¶ 200.

<sup>10/</sup> Id.

result in further delay in the processing of these applications as potential applicants would need sufficient time to study the relevant markets, develop business plans, and secure financing in order to compete in these markets.

Moreover, the policy concerns which usually support the Commission's decisions to hold open auctions rather than auctions limited to only pending applicants do not exist in the broadcast FM service. First, as noted above, the Commission has not proposed rules which, if adopted, would result in a substantial change in the nature of the broadcast FM service. Thus, there is no basis for the argument that applicants who did not file applications in response to previous filing windows will be more inclined to seek licenses in the relevant markets now simply because these licenses are not subject to auction. Indeed, any party interested in serving the markets that are subject to the pending applications had ample opportunity to file a competing application at that time. Providing additional applicants with a second bite of the apple, particularly where, as here, no substantial change to the nature of the service has occurred, would serve only to delay the auction process.

In addition, concerns regarding speculation and spectrum warehousing do not exist here. There is no evidence that any of the pending applicants are merely speculating or, if successful at auction, would not actually construct the FM station, but rather would choose to warehouse the spectrum. As such, a closed auction would not be inconsistent with the public interest objective, set forth in 47 U.S.C. § 309(j)(3)(D), of ensuring efficient and intensive use of the electromagnetic spectrum.

Moreover, limiting the eligibility for participation in the auction to those with pending applications would not compromise the Commission's ability to comply with



other public interest objectives set forth in the Communications Act's auction provisions. For example, as these applicants presumably have already begun developing business plans for the provision of broadcast service in their respective markets, a closed auction limited to those with currently pending applications would not preclude the rapid deployment of additional broadcast services within these markets.<sup>11/</sup> In addition, at least in one case, a closed auction would include the participation of small, new entrants into the broadcast industry.<sup>12/</sup> As such, the Commission would be able to fulfill the public interest objective of promoting economic opportunity and competition within the broadcast industry.<sup>13/</sup>

## V. CONCLUSION

Limiting eligibility for participation in an auction of pending applications filed after June 30, 1997 pursuant to a filing window would serve the public interest. As noted above, such action would be consistent with Congressional intent which was only concerned with situations where the Commission had not opened filing windows to allow the filing of competing applications. Moreover, allowing additional competing applicants is inappropriate here since the nature of the broadcast service has not been changed. Finally, conducting a closed auction would be consistent with the public interest

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<sup>11/</sup> See 47 U.S.C. § 309(j)(3)(A).

<sup>12/</sup> Bernhard, if successful in an auction, would be a new entrant within the broadcast radio industry.

<sup>13/</sup> 47 U.S.C. § 309(j)(3)(B).

objectives set forth in 47 U.S.C. § 309(j)(3). Accordingly, the Joint Commenters urge the Commission to act on their pending applications pursuant to a closed auction.

Respectfully submitted,

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